APPEAL NO. 040517
FILED APRIL 29, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on February 10, 2004. The hearing officer resolved the disputed issues by deciding that the _____, compensable injury does extend to include the diagnosis of lumbar disc herniation at L4-S1; that the employer did not tender a bona fide offer of employment (BFOE) to the respondent (claimant); and that the claimant has had disability resulting from the injury sustained on _____, from August 26, 2003, continuing to the date of the CCH. The appellant (carrier) appealed, disputing the determinations of the hearing officer. The claimant responded, urging affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury to the low back on _____. The hearing officer did not err in reaching the complained-of extent-of-injury determination. We have held that the question of the extent of an injury is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying this standard, we find there was sufficient evidence in the record to support the hearing officer's extent-of-injury finding. While the carrier contends that the mechanism of injury and the claimant's congenital defect in the form of a transitional vertebrae argue against the hearing officer's resolution of the extent of injury, it was up

to the hearing officer to determine what weight to give these factors. The carrier further contends that the objective diagnostic evidence does not support evidence of a frank or acute trauma at the lumbar spine at L4-S1. The hearing officer chose to give greater weight to the testimony of the claimant and the medical evidence supporting the claimant's position regarding the extent of injury and this was within her province as the finder of fact.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6(c) (Rule 129.6(c)) sets out the requirements for a BFOE. This portion of the rule is clear and unambiguous, and provides:

> (c) An employer's offer of modified duty shall be made to the employee in writing and in the form and manner prescribed by the [Texas Workers' Compensation Commission (Commission)]. A copy of the Work Status Report [TWCC-73] on which the offer is being based shall be included with the offer as well as the following information:
>
> (1) the location at which the employee will be working;
>
> (2) the schedule the employee will be working;
>
> (3) the wages that the employee will be paid;
>
> (4) a description of the physical and time requirements that the position will entail; and
>
> (5) a statement that the employer will only assign tasks consistent with the employee's physical abilities, knowledge, and skills and will provide training if necessary.

Rule 129.6(d) provides that a carrier may deem an offer to be bona fide if it, among other requirements, included all the information required in Rule 129.6(c). Rule 129.6 indicates that the Commission "will" find an offer to be bona fide if it conforms to the doctor's restrictions, is communicated to the employee in writing, and meets the requirements of Rule 129.6(c). We believe the language of Rule 129.6(c) is clear and unambiguous. The rule contains no exceptions for failing to strictly comply with its requirements. *See* Texas Workers' Compensation Commission Appeal No. 030484, decided April 16, 2003.

The hearing officer noted in her Statement of the Evidence that while the letter indicated that the claimant had been placed on a work schedule and the expected date and time of her return to work, it failed to specify her work schedule or a description of the physical and time requirements the offered position would entail. The hearing officer found that the letter in evidence put forward as a BFOE failed to comply with Rule 129.6. The hearing officer additionally found that the position offered was not consistent with the claimant's work abilities as certified by Dr. R on September 9, 2003.

The hearing officer did not err in her determination regarding BFOE. We reject the carrier's assertion that "an over-sensitive reading of Rule 129.6 defeats the purpose of the rule and legislative intent behind the issuance of [BFOEs.]" The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's determination that the employer did not tender a BFOE to the claimant is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, *supra*.

The carrier contends that, "the claimant's compensable injury in the form of a sprain/strain/contusion to the back does not support a holding of disability in excess of six to eight weeks." Disability is a question of fact to be resolved by the hearing officer. Further we have affirmed the extent-of-injury determination and there was evidence that the claimant had spinal surgery two weeks prior to the CCH. There is sufficient evidence to support the hearing officer's determination of disability.

The carrier also asserts that the claimant cannot establish disability because her inability to obtain or retain employment at preinjury wage levels was the result of the claimant's failure to avail herself of reasonably available employment offered by the claimant's employer. The carrier cites, in support of its position, Texas Workers' Compensation Commission Appeal No. 012646, decided December 10, 2001. However, in that case, we affirmed the hearing officer's determination that the claimant had disability for the period of light-duty, notwithstanding the availability of light-duty employment consistent with the claimant's restrictions. Indeed, we have said on numerous occasions that a claimant under a light-duty release does not have an obligation to look for work or show that work was not available within his or her restrictions. Texas Workers' Compensation Commission 022908, decided January 8, 2003.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

GARY SUDOL
9330 LBJ FREEWAY, SUITE 1200
DALLAS, TEXAS 75243.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge